BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

MICHAEL A. ZARNOWSKI Claimant VS. **COLLINGWOOD GRAIN, INC.** Respondent AND **OLD REPUBLIC INSURANCE COMPANY** Insurance Carrier	)	Docket No. 190,684

ORDER

Claimant, respondent and its insurance carrier request review of the November 29, 1995 Award by Administrative Law Judge Bruce E. Moore. The Appeals Board heard oral argument on April 4, 1996.

APPEARANCES

The claimant appeared by his attorney Robert A. Anderson of Ellinwood, Kansas. The respondent and its insurance carrier appeared by their attorney James M. McVay of Great Bend, Kansas.

RECORD AND STIPULATIONS

The Appeals Board has considered the record and adopts the stipulations listed in the Award of the Administrative Law Judge.

ISSUES

The sole issue upon which review is requested by both the claimant and the respondent/insurance carrier is the nature and extent of claimant's disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire record and having considered the briefs and arguments of the parties, the Appeals Board finds:

The Award of the Administrative Law Judge should be modified. The Appeals Board agrees with the finding of a work disability. The finding concerning the extent to which claimant's average weekly wage has been reduced post-injury should be affirmed. However, the finding by the Administrative Law Judge that there is no competent evidence as to the extent to which claimant's task-performing ability has been reduced should be reversed.

Respondent admitted claimant met with personal injury by accident on April 12, 1994 and that claimant's accidental injury arose out of and in the course of his employment. Although respondent continues to argue evidence to suggest that an accident did not occur, that issue is not before the Appeals Board. The parties stipulated to personal injury by accident arising out of and in the course of employment.

Respondent did, however, reserve the question of permanency resulting from the injury. At the regular hearing, counsel for respondent stipulated to a 1 percent functional impairment rating given by Dr. Robert L. Eyster only in the context that it was based upon accepting claimant's subjective complaints. Dr. Eyster agreed that if the subjective complaints were not credible then the objective evidence would not support a finding of a permanent impairment of function. Respondent argues that the Appeals Board should find that claimant did not suffer any permanent injury from his alleged work-related accident. The Appeals Board is persuaded by the greater weight of the evidence to conclude that the claimant's subjective complaints to Dr. Eyster were legitimate and supported by the record taken as a whole. Accordingly, the Appeals Board finds claimant to have sustained a 1 percent permanent functional impairment from the April 12, 1994 accident.

The respondent next contends that even if the claimant suffered a permanent injury, he should not be allowed to recover a disability above his impairment of function because after returning to work he was terminated for cause. Respondent cites the Appeals Board decision in Jesse F. Acklin v. Woodson County, Docket No. 147,322 (decided May 31, 1995) and the Kansas Court of Appeals decision in Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), rev. denied 257 Kan. 1091 (1995). The Foulk decision was based upon the predecessor to the current version of K.S.A. 44-510e. The current statute is the version of the work-disability definition applicable to this claim. However, the rationale of the Kansas Court of Appeals in Foulk has been applied to work-disability claims arising under the 1993 amendments. *See* John R. Wollenberg v. Marley Cooling Tower Company, Docket No. 184,428 (September 26, 1995). In Foulk the Kansas Court of Appeals stated:

> "Construing K.S.A. 1988 Supp. 44-510e(a) to allow a worker to avoid the presumption of no work disability by virtue of the worker's refusal to engage in work at a comparable wage would be unreasonable where the proffered job is within the worker's ability and the worker has refused to even attempt the job. The legislature clearly intended for a worker not to receive compensation where the worker was still capable of earning nearly the same wage. Further, it would be unreasonable for this court to conclude that the legislature intended to encourage workers to merely sit at home, refuse to work, and take advantage of the workers compensation system. To construe K.S.A. 1988 Supp. 44-510e(a) as claimant suggests would be to reward

> workers for their refusal to accept a position within their capabilities at a comparable wage."

In Acklin, the Appeals Board held that "[e]mployees terminated for misconduct or poor performance invoke similar policy considerations." The Appeals Board reasoned that an employee terminated for poor job performance unrelated to the work-related injury may reasonably be considered to have the "ability" to perform the job where the job loss resulted from matters within the employee's control. Under the facts of the Acklin case, the Appeals Board declined to apply the rationale of Lee v. Boeing Co. - Wichita, 21 Kan. App. 2d 365, 899 P.2d 516 (1995) which held that an economic layoff may overcome the presumption of no work disability contained in K.S.A. 1988 Supp. 44-510e for workers who return to work at a comparable wage. Here again, it should be noted that although Acklin applied the version of K.S.A. 1988 Supp. 44-510e which existed prior to the legislature's 1993 amendments to the work disability definition, the rationale may also be applied to the current law.

Conversely, claimant contends that this case is more analogous to the Appeals Board decision in Gayle W. James v. Valassis Color Graphics, Inc., Docket No. 165,727 (decided December 28, 1994) than it is to Acklin. In James, the Appeals Board found that claimant's injury prevented him from continuing to perform the work he attempted to perform for the respondent post-injury. In so doing, the Appeals Board found that the rationale of Foulk and the presumption of work disability would not apply.

In this case the claimant was released to return to work on a trial basis by Dr. Eyster. He worked one week before being discharged for unsatisfactory job performance. During that one week claimant, on at least two occasions, left work early due to back symptoms related to his injury. On two other occasions he turned down an offer to work overtime for the same reason. We cannot say from the evidence that claimant demonstrated an ability to perform the job which respondent offered, nor can we say that his job was within the permanent restrictions imposed by Dr. Eyster. Furthermore, although there are some musings in the record to the effect that claimant's unsatisfactory job performance could have been deliberate, we do not view the record as establishing such. When confronted directly with the question as to whether he is alleging that claimant's errors were sabotage, claimant's supervisor denied same. Stating that, rather, he is placing the blame for mistakes on the claimant because the problems occurred during claimant's watch; thus, claimant was responsible. While claimant may have been negligent in the performance of his job duty, there is no evidence of malfeasance. Under these facts, the Appeals Board would not impute to the claimant the wage he was earning with the respondent post-injury. Accordingly, the claimant should not be precluded from receiving a work disability from the date of his termination.

The work disability definition found in K.S.A. 44-510e(a) as enacted by the 1993 legislature is as follows:

> "The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury."

The only evidence of task loss, in the opinion of a physician, was given by Dr. Eyster. He was presented with a hypothetical question describing claimant's job duties in narrative form which spans pages 8 through 12 of his deposition testimony and is then asked to give his opinion concerning the extent to which claimant has lost the ability to perform the work tasks described. His answer which appears at page 13 of that deposition is as follows:

> "A. I think that he is going to have a problem with the bending, which this job requires and that is the main thing that is going to interfere with his ability to handle it in the fashion they probably handled it before. I would estimate probably at 35 percent."

Although there are better methods of obtaining a physician's task-loss opinion testimony, the Appeals Board finds that this evidence does meet the minimum requirements of the statute. Accordingly, the Appeals Board finds the claimant's loss of task-performing ability to be 35 percent.

The second prong of this two-part test concerns the difference between the claimant's average weekly wage and the claimant's actual post-accident earnings. The findings of the Administrative Law Judge in this regard were not disputed by either of the parties to this appeal. Accordingly, they will be adopted by the Appeals Board. This prong of the two-part test is complicated by the fact that claimant's earnings changed several times during the period of time from the date of the accident until the submission of this claim. From the July 8, 1994 to July 14, 1994 claimant had returned to work and had no wage loss. From July 15, 1994 through December 31, 1994, a period of 24.29 weeks, claimant was unemployed. Thus, during this time claimant had a 100 percent wage loss. When averaged with his 35 percent task loss, his work disability was 67.5 percent. From January 1, 1995 through March 23, 1995, a period of 11.71 weeks, claimant earned an average weekly wage of $310, which when compared to the average weekly wage he was earning at the time of injury including the value of the fringe benefits, yields approximately a 52 percent wage reduction. When this is averaged with his 35 percent task reduction, claimant possessed a 43.5 percent work disability. As of March 24, 1995, claimant was employed earning an average weekly wage of $544 for a 15.7 percent wage loss. When averaged with the task loss, claimant's work disability becomes 25.35 percent.

The Appeals Board agrees that claimant has sustained his burden of proof and is entitled to a permanent partial disability award based upon a work disability in excess of his functional impairment. The other findings of fact and conclusions of law as enumerated in the Award by the Administrative Law Judge are found to be accurate and appropriate and are hereby adopted by the Appeals Board as its own as if specifically set forth herein to the extent they are not inconsistent with the specific findings and conclusions of the Appeals Board enumerated herein.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Bruce E. Moore dated November 29, 1995 should be, and hereby is, affirmed in part and modified in part as follows:

AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Michael A. Zarnowski, and against the

respondent, Collingwood Grain, Inc., and its insurance carrier, Old Republic Insurance Company, for an accidental injury which occurred April 12, 1994 and based upon an average weekly wage of $645.02, for 12.29 weeks of temporary total disability compensation at the rate of $313 per week or $3,846.77, followed by 1 week at the rate of $313 per week or $313 for a 1% permanent functional impairment, followed by 24.29 weeks at the rate of $313 for a 67.5% work disability or $7,602.77, followed by 11.71 weeks at the rate of $313 or $3,665.23 for a 43.5% work disability, followed by 68.20 weeks at the rate of $313 for a 25.35% work disability or $21,346.60, making a total award of $36,774.37.

As of April 30, 1996, there is due and owing claimant 12.29 weeks temporary total disability compensation at the rate of $313 per week or $3,846.77, followed by 1 week of permanent functional impairment at the rate of $313, followed by 94.71 weeks of permanent partial disability compensation at the rate of $313 per week in the sum of $29,664.23, for a total of $33,491.00 which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of $3,283.37 is to be paid for 10.49 weeks at the rate of $313 per week, until fully paid or further order of the Director.

FURTHER, AWARD IS MADE that the claimant is entitled to medical expenses and any unauthorized medical expenses incurred up to the statutory maximum of $500 upon proper presentation of itemized statements.

Future medical will be considered upon proper application.

Pursuant to K.S.A. 44-536, claimant's fee contract with his attorney is approved, subject to any attorney lien previously asserted by W. Walter Craig.

Fees necessary to defray the expenses of administration of the Workers Compensation Act are hereby assessed against the respondent and such are directed to pay costs of the transcripts as follows:

BARBER & ASSOCIATES	
Deposition of Dr. Robert Eyster Dated May 31, 1995	$ 160.00
OWENS, BRAKE, COWAN & ASSOCIATES	
Regular Hearing Transcript Dated August 2, 1995	$ 337.70
Deposition of Tom Lechtenberg Dated August 24, 1995	$ 537.70
Deposition of Ken Summers Dated August 24, 1995	$ 396.50
Deposition of Daniel Hurst, D.C. Dated September 14, 1995	$ 121.45

Deposition of Thornton White Dated September 14, 1995	$ 202.30
Total	$1595.65

IT IS SO ORDERED.

Dated this ____ day of April 1996.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Robert A. Anderson, Ellinwood, KS
James M. McVay, Great Bend, KS
Bruce E. Moore, Administrative Law Judge
Philip S. Harness, Director